STATE OF MICHIGAN

COURT OF APPEALS

SHANTI PICCALO, Plaintiff-Appellant, v GILLIAN NIX, Defendant-Appellee.	FOR PUBLICATION May 15, 2001 9:10 a.m. No. 212752 Oakland Circuit Court LC No. 96-527301-NI Updated Copy July 20, 2001

Before: Zahra, P.J., and Hood and McDonald, JJ.

ZAHRA, P.J. (*dissenting*).

I respectfully dissent. I disagree with the majority's conclusion that the impairment defense statute, MCL 600.2955a, should be ignored because its application in this case renders an absurd or unjust result. I conclude that the majority has impermissibly utilized the "absurd or unjust result" method of statutory avoidance to substitute its judgment for that of the Legislature. I also disagree with the majority's conclusion that the trial court erred in failing to strike plaintiff's testimony regarding her percentage of fault. Finally, I do not conclude that the cumulative effect of the remaining errors alleged in this case warrants setting aside the judgment rendered below and ordering a new trial.

I do not subscribe to a method of statutory construction that allows deviation from the express language of a statute merely because a reviewing court may conclude that application of the statute renders an absurd or unjust result. *People v McIntire*, 461 Mich 147, 155-156, n 2; 599 NW2d 102 (1999) (explaining that departure from the literal construction of a statute where application may render an absurd or unjust result invites impermissible judicial law making). To the extent this method of statutory avoidance remains viable after our Supreme Court's condemnation of it in *McIntire*, application of the impairment defense statute to this case is neither absurd nor unjust.

The impairment defense statute was enacted as part of the tort reform package of 1996. In reforming our state's tort system, our Legislature enacted laws that promote personal responsibility for one's conduct. While both plaintiff and Burnham, the intoxicated driver of the van in which plaintiff was injured, were not legally permitted to consume alcohol, they were adults (over the age of eighteen) at the time of this accident. Certain duties attach to a person who reaches the age of majority. The most obvious duty attaching to the legal status of

adulthood is the duty to obey the laws of the land. Failure to act within the law will result in the imposition of adult sanctions. I do not conclude that it is absurd for the Legislature to enact a law that prohibits an adult from bringing suit for injuries that are the result of that adult's illegal activities. This is the result reached in this case if the impairment defense is applied. Both plaintiff and Burnham knew or should have known they were precluded by law from consuming alcohol or illegal drugs.

It is also not absurd that this defense applies even where the illegal conduct is facilitated by the alleged tortfeasor. Rather, it is a policy choice made by the Legislature. Principles of separation of powers preclude us from rendering the Legislature's action void merely because we disagree with the result of its application. *Tyler v Livonia Public Schools*, 459 Mich 382, 393, n 10; 590 NW2d 560 (1999) (providing: "Our role as members of the judiciary is not to determine whether there is a 'more proper way,' that is, to engage in judicial legislation, but is rather to determine the way that was in fact chosen by the Legislature. It is the Legislature, not we, who are the people's representatives and authorized to decide public policy matters . . . ."). For these reasons, I conclude that the absurd or unjust result method of statutory avoidance has no application to the present case.

I also disagree with the majority's conclusion that the trial court erred in failing to strike plaintiff's testimony regarding her percentage of fault. The trial court was never asked to strike this testimony. Plaintiff's counsel failed to preserve this issue with a proper objection. Thus, appellate review is waived. We may review unpreserved error where manifest injustice results from our failure to review the issue. *Winters v Dalton*, 207 Mich App 76, 79; 523 NW2d 636 (1994). However, I conclude no manifest injustice results from our failure to review this claim of unpreserved error. When defense counsel entered this area of questioning, plaintiff's counsel asserted a general objection, without offering an evidentiary basis for the objection. The trial court asked defense counsel to rephrase the question. The question was then restated, without objection from plaintiff's counsel. Plaintiff's counsel was keenly aware of the sensitive nature of the questioning and consciously chose not to object to it. Under these circumstances we should conclude plaintiff's counsel chose not to pursue his objection as a matter of trial strategy. It is improper for this Court to find manifest injustice from an unpreserved error where it appears clear from the record that the decision not to preserve the issue was a matter of trial strategy.[1]

Finally, having rejected the above two arguments, I cannot conclude that the cumulative effect of plaintiff's remaining claims of error is sufficient to set aside the verdict rendered in this case. I would affirm.

/s/ Brian K. Zahra

---

[1] I also conclude that the majority has misapplied the manifest injustice standard. The manifest injustice needed to ignore a litigant's failure to preserve an issue for appellate review should emanate from the claim of unpreserved error. *Winters*, *supra*. In this case, the majority finds manifest injustice, not from the fact that plaintiff testified that she was fifty percent at fault for her injuries, but from "the cumulative error present in this case." *Ante*, p ___, n 6.